Office Supreme Court, U.S.
FILED
APR 7, 1964
JOHN F. DAVIS, CLERK

No. 975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

DENNIS GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE F. CALLAGHAN
105 West Adams Street
Chicago, Illinois

JULIUS LUCIUS ECHELES
30 North LaSalle Street
Chicago, Illinois
Attorneys for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

INDEX

PAGE

Judgment and Opinion of the Court Below 1

Jurisdictional Statement 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 4

The evidence against Green 5

Evidence pertaining to the other defendants 12

Evidence for defendant Dennis Green 17

Evidence on behalf of the other defendants 18

Rebuttal for the Government 19

Reasons Relied on for the Allowance of the Writ 20

I. As this was a closely contested case on the facts, it was error for the court to permit the jury to consider the government witnesses Noble Thigpen and Willard Evans as any other competent witnesses, notwithstanding they both admitted to being narcotic addicts for a good many years 20

It was not only error for the court to refuse to instruct in any manner that the jury should view with care and caution and extreme suspicion the testimony of a narcotic addict, but the error was compounded when the court advised the jury that "a witness was presumed to speak the truth." 20

PAGE

Considering the prevalence of narcotic prosecutions by use of informant addicts themselves amenable to the prosecution arm, certiorari should be granted in order that this court may guide the trial courts on how to instruct juries in the consideration of the testimony of admitted narcotic addicts. Although a number of circuits have spoken and a few of the state Supreme Courts, your Honors have not yet reviewed the issue 20

II. Was it not further error to refuse to instruct that the testimony of government witnesses who admitted their participation in crime should be received with suspicion and acted upon with care and caution? 29

III. Even in a conspiracy case the guilt of a defendant is individual. It was error for the court to instruct the jury that it may find the petitioner guilty even if he did not have knowledge of the details or means by which the object of the conspiracy was to be accomplished 31

Conclusion 40

Appendices:

Appendix A—Opinion ..... App. 1

Appendix B—Petition for rehearing denied ..... App. 10

Appendix C—Section 174, Title 21, U. S. Code ..... App. 10

AUTHORITIES

Cases

	PAGE
Bollenbach v. United States, 326 U.S. 607, 613	34
Cannnetti v. United States, 242 U.S. 470	29
Delli Paoli v. United States, 352 U.S. 232, 242	29
Fletcher v. United States, D.C. Cir., 158 F. 2d 324	22, 27, 28
Kotteakos v. United States, 328 U.S. 750, 755	38
Krulewitch v. United States, 336 U.S. 440, 445-6	40
Knapp v. United States, 5 Cir. 316 F. 2d 794 (1963)	25, 28
On Lee v. United States, 343 U.S. 747, 757	27, 31
Opper v. United States, 348 U.S. 84, 95	29
People v. Bazemore, 25 Ill. 2d 74, 182 N.E. 2d 649 (1962)	24, 27
People v. Crump, 5 Ill. 2d 251, 264	23
State v. Prentice, 192 Ia. 207, 183 N.W. 411	23
State v. Fong Loon, 29 Idaho 248, 158 P. 233, 236	23
United States v. Aviles, 2 Cir., 274 F.2d 179	39
United States v. Balodimas, 7 Cir. 177 F.2d 485, 487	36
United States v. Bentvena, et al., 319 F.2d 916, 2 Cir. 1963	34, 40
United States v. Landry, 7 Cir., 257 F.2d 425, 431	32
United States v. Masino, 2 Cir. 275 F.2d 139	28

PAGE

United States v. Massiah, 307 F.2d 62, 70 (1962) 33

United States v. Russano, 2 Cir., 257 F.2d 712 39

United States v. Stromberg, 2 Cir., 268 F.2d 206 39

Miscellaneous

Section 174, Title 21, U. S. Code 31, 33, 39

52 ALR 2d 834 23

27 FRD 67 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No.

DENNIS GREEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE

To The Honorable Chief Justice and Associate Justices of the United States:

Your petitioner, Dennis Green, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT AND OPINION OF THE COURT BELOW

On February 12, 1964, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing defendant to

imprisonment for a term of five years. The Court of Appeals opinion as yet has not been reported. It is printed herewith as Appendix "A".

JURISDICTIONAL STATEMENT

On a jury trial defendant was convicted of conspiracy to violate the narcotic laws in violation of Section 174, Title 21, U. S. Code.

The judgment of conviction was affirmed on February 12, 1964; and a timely petition for rehearing was denied on March 9, 1964. (Appendix "B").

The jurisdiction of this court is invoked under the provisions of Title 28, U. S. Code 1254(1).

QUESTIONS PRESENTED

1. Where the facts in the case are closely contested and where the government's case against the petitioner rested almost solely upon the credibility of an admitted narcotic addict, was not due process violated when the court refused to submit properly the issue of the credibility of the witness to the jury under careful and appropriate instructions?

And was it not error to refuse to instruct the jury to take into consideration the fact that the government witness was a user of narcotics, under circumstances such as here?

2. In the face of refusal by the court to instruct the jury that it should scrutinize closely the testimony of a narcotic addict, was not the error compounded when the court advised the jury that "a witness is presumed to speak the truth?"

3. Where an appeal in a criminal case is a matter of right (*Coppedge v. United States*, 369 U.S. 438, 441), may the Court of Appeals ignore a claimed error on instruc-

tions by stating, "We see no need of discussing other claims of error in the giving, or refusing, of other instructions?"

Was it not error for the trial court to refuse to instruct, as requested, that the testimony of government witnesses who admitted their participation in crime should be received with suspicion and acted upon with care and caution?

4. Where the government chose to indict the defendant for conspiracy to import narcotic drugs contrary to law, knowing the same to have been unlawfully imported in violation of Section 174, Title 21, U.S. Code, in order to obtain the benefit of the presumption of knowledge of illegal importation from the fact of possession, may the government obtain the advantage of the statutory presumption when no proof of possession in the petitioner is shown?

May the Court of Appeals in its opinion ignore this claimed error when it failed to render its opinion on this point? And is not the holding in this case in conflict with the Second Circuit's holding in *United States* v. *Massiah*, 307 F. 2d 62 (1962). May the reviewing court effectively deny petitioner's right to a review in failing to render its opinion in connection with a claimed error to which another circuit has ruled adverse to the government?

5. Assuming uncritical acceptance of the government's case in its entirety, were not separate conspiracies shown *ala Kotteakos* v. *United States*, 321 U.S. 750 and, therefore, improperly joined?

STATUTES INVOLVED

Section 174, Title 21, U.S. Code (relevant portions set out in Appendix "C").

STATEMENT OF THE CASE.

Defendant Dennis Green was indicted on September 2, 1959 (A. 1) for conspiracy with defendants Nathanial Spurlark, Edward Gayles, Arthur Faulkner, Willard Jones, Gladys Davis, Cornelius Mack, Percy Jones and Floyd Williams to import narcotic drugs contrary to law, and to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of such narcotic drugs after being unlawfully imported, knowing the same to have been imported and brought into the United States, contrary to law in violation of Section 174, Title 21, United States Code (A. 7-8). The indictment charged the conspiracy commenced on January 1, 1952 and continued to the date of the indictment, September 2, 1959. Non-defendant co-conspirators named were Noble Thigpen, Willard Evans, Woodrow Wilson, Charles Webb, Moses Mardis and Katey B. Lewis, deceased (A. 7).* Of fourteen overt acts specified in the indictment, Dennis Green is mentioned in three of them: no. 5, that in November or December, 1955, he sold a quantity of heroin to Woodrow Wilson; no. 6, that in November or December, 1955, defendant Arthur Faulkner paid $6,000 to him in Chicago; and no. 10, that he had a conversation with defendant Gayles in September, 1957.

Green moved for a severance (A. 20) and for a bill of particulars (A. 2). The motions were denied.

*The printed Appendix as filed omitted Cornelius Mack from the names of defendants and, omitted Woodrow Wilson, Charles Webb and Moses Mardis as non-defendant co-conspirators.

THE EVIDENCE AGAINST GREEN.[1]

Government witness Woodrow Wilson testified he was released from the United States Army in October, 1955 after six months' service (A. 94). He saw defendant Green in the Rodeo Lounge a couple of months after he got out of the Army (A. 95). He told Green that (defendant) Spurlark was kind of sore at him because Spurlark found out the witness made a couple of buys in New York and Spurlark would not sell him any more stuff (A. 95). The witness asked Green what he could do about it and Green said that Ted (Spurlark) and he were in business together, that Ted was his partner (A. 95). The witness asked Green to get him some merchandise at a better price and Green said he would. The witness said he was buying a kilo or two every once in a while. Green told him to see Harriet Doyle and tell her that he had sent the witness (A. 95). Green said his stuff was going to cost $200, and that his stuff would be better than Ted's because Ted cuts his a little more. The witness went to Harriet's house and received an ounce from her for $400 (A. 95). A week later Harriet Doyle sold him another package of white powder for $400 (A. 95).

On cross examination, Wilson testified he knew Dolores Doyle, and that Harriet Doyle was his girl friend in 1955 before he went to the Army (A. 100). He engaged in narcotics with Dolores Doyle, the sister of Harriet Doyle in 1955 (A. 100-101). He knew Harriet and Dolores Doyle for a long period of time before he ever knew Dennis Green (A. 101). Harriet wouldn't do business with the witness without Green's okay (A. 101).

---

[1] The evidence is set out fully to demonstrate the claimed error that there were separate conspiracies, taking the Government's case at its best.

He never received any narcotics from Green and never gave Green any money (A. 104). After he had a falling out with Spurlark, he selected Dennis Green because he had ceased operations with Spurlark and was looking around for somebody else (A. 105). Green said he could give the witness a better price and better merchandise (A. 105). Since he left the penitentiary in Michigan he had lived in Detroit and was unemployed.

Government witness Moses Winston Mardis testified he was a bail bondsman in 1954 and 1955. Two or three weeks after May, 1955, he spoke with Mr. Spurlark about financing himself in the bail bond business. Spurlark said that he would have to talk to Mr. Green (not otherwise identified) about it (A. 219). Again, in December, 1955, he had a conversation in Spurlark's home with Spurlark who was talking to him about the west side. The witness was trying to intercede for another gentleman to take over the business on the west side. He asked if Spurlark would turn his business over on the west side to a Mr. White, and Spurlark said, "No, I'm turning it over to a Mr. Green." (Not otherwise identified. A. 219). The witness asked Spurlark why not put Mr. White in charge, that he represents Mr. White and Spurlark said, "No, Dennis Green (not otherwise identified) is the man of my choosing." (A. 202).

(Green's lawyer moved to strike the testimony of Mardis on the ground that none of the conversations was pursuant to the conspiracy charge and further that the government may not establish a conspiracy against a so-called co-conspirator by evidence of conversations between two of the other co-conspirators out of the presence of that co-conspirator, but the motion was overruled. (A. 221).

On cross examination, Mr. Mardis testified he was not concerned with the west side transaction beyond the fact that it might be a purely legitimate matter and an opportunity for him to sign more bonds; that there was nothing illegal that he participated in or that he discussed (A. 222).

Government witness Willard Evans testified he was a narcotic addict (A. 227). He knew defendants Green and Faulkner. In January, 1952, he saw defendant Green in the vicinity of Damen and Lake. He told Green he wanted to buy some stuff and Green said an eighth of a kilo would cost $1,700. He gave Green the money and Green delivered the package to his mother's house, 2343 Warren Avenue (A. 228). He and his wife tested the powder, cooked some of the heroin and injected it into their veins. He cut the heroin and sold it to his different customers (A. 228). He saw Mr. Green after that about once or twice a week from 1952 off and on until 1959 (A. 228). In the second week of January, he saw Green in the Setup Lounge. He told Green he was ready to buy some stuff. He gave Green $1,700 and Green told him to meet him on Maypole in about an hour. He subsequently saw Green come out of a garage and give him a package of white powder. He took it home, tested it, mixed it up and sold it (A. 228-229). About a week or two after that, he saw Green again at the Setup Lounge around Oakley and Lake. He gave Green $1,700 and went around on Maypole and Green handed him a package of white powder. He cooked the white powder, injected some in his vein, mixed it up and sold it. From 1952 to 1954 he would get in touch with Green, and buy some stuff. He would sell it (A. 229). He stopped buying from Green for a while and then started buying again (A. 229).

Winston Mardis introduced the witness to Ted Spurlark in May, 1954 on 47th Street. Mardis told the witness that Spurlark would sell him some stuff if he could get the money. The witness told Spurlark he had the money and asked how much the stuff would cost. Spurlark said it would cost about $3,000 and that it would be good stuff, better than the stuff he had been getting from Green (A. 230). About ten days later, he saw Spurlark in the Rodeo Lounge and said he was ready to buy; Spurlark sent him to a young lady named Katy B. Lewis. He went to Katy's apartment and gave her $3,000. Later, she gave him a package of white powder which he took with him, tested, mixed, and sold it (A. 230-231). About every two weeks, he would get in touch with Spurlark, who would send him to see Katy B., who would give him a package of white powder in exchange for $3,000. He would test it and then sell it (A. 231). In July, 1954, he went to the Rodeo Lounge; Spurlark told him a federal agent was watching the lounge and that they should meet at 45th and South Parkway. They met there and he gave Spurlark $3,000 and a young lady by the name of Harriet, he thought, gave him a package of white powder (A. 232).

Early in 1955, at Mardis' house, Dennis Green, Winston Mardis, Ted Spurlark and Jimmy White were present. "Well, we was talking about Dennis Green was going to take over the sale of narcotics on the west side, and everybody who was buying stuff from over there would have to buy it from Dennis Green." (A. 232).

In November or December, 1955, he saw defendant Faulkner at the Mambo Lounge, 1900 block on Lake Street. He talked to Faulkner about lowering the prices on narcotics because he and Faulkner were undercutting each other. He thought it would be a good idea if they could combine their business and make it one operation, and Faulkner also thought it was a good idea. They called

Dennis Green, who came over, and Green also said it was a good idea (A. 233). Green came to the lounge and Faulkner told Green that the witness and Faulkner were going to combine their business in the sale of narcotics on the west side. Green said it was all right with him and said that he would sell them a half kilo for $6,000 (A. 233). About ten days later, near 63rd and Loomis, Faulkner, Green and the witness met. The witness gave Green $6,000. Green told them to meet him in an alley in about fifteen minutes. They met, and Green gave a package to the witness which he gave to Faulkner (A. 233). Faulkner and the witness brought the package to Karlov near 16th Street, where the stuff was tested, mixed and distributed out to be sold (A. 233).

In April 1956, he had broken up partnership with Faulkner and saw Dennis Green again and said he wanted to buy stuff on his own (A. 235). Green said it would be the same price, $3,000 for a quarter kilo of heroin. He met Green in April, 1956 on Maypole near Western and gave Green $3,000 and received a package of white powder which he cooked, tested, mixed and sold to his customers (A. 235). In June, 1956, at the Setup Lounge Green told him there was a shortage of narcotics and he didn't have any and would let him know when he could get some. He next saw Green after the Moloott-Marciana *(sic)* fight around Oakley and Lake in 1956. (Green said Ted Spurlark and Faulkner went to the fight and they came back and the stuff was in. That was the latter part of June). Green told the witness to meet him around Maypole and they met, he gave Green $3,000 and Green gave him a package (A. 236). It took him a week or two to sell a quarter kilo of heroin (A. 236).

He saw Mr. Green off and on from 1956 to 1959 (A. 236). During the period when he was not seeing Green, he saw Faulkner about once a week or every other week. Green

told the witness he was going to California and that Faulkner would take over the business while he was gone (A. 237). After he stopped seeing Faulkner, he started seeing Green again. He would tell Green he wanted to get some stuff. Green would tell him to bring the money and Green would deliver the package of white powder. The witness would take it, test, mix and sell it to his customers (A. 237). That was between July and August, 1956.

In August, 1959, at Western and Madison Street, Green, Dorothy Watson and the witness had a conversation in which Green said he was leaving town because he figured a grand jury investigation was coming. They arranged for the sale of some stuff for $1,000 through his girlfriend. Dorothy called him and told him to go to her sister's house near Washington Boulevard and Western and that her sister would give him a package. He went there, gave her $10, and she gave him a package of white powder which he tested, mixed and sold (A. 238). He was arrested in August, 1959 by the state narcotic agents with five ounces of heroin, which he obtained from Dennis Green (A. 239).

At the meeting in Mardis' house in 1955, Spurlark and Green discussed the payments of fees for police protection. Green told him later, his fee was $300 per month and he made payments until 1957 (A. 244-245).

Evans further testified he was a narcotic addict for about ten years off and on, the last time being August, 1961. He was a registered narcotic addict and the narcotics he used up to 1961 were purchased in the illegal market after he had given the government a statement (A. 245). He used narcotics once or twice a day until August, 1961 (A. 246).

The last time he took heroin in his veins was two or three months prior to his testimony (A. 256).

On further cross examination, the witness stated that narcotic agent Valentine was in the grand jury with him when he testified before that body (A. 258). In the statement he gave to the government agents he told them about the payment of $6,000 in the transaction between himself and Faulkner and Green, but that incident was not in the statement. He told the grand jury the incident about the $6,000 (A. 258).

(The defense made a motion to dismiss the indictment on the ground that it affirmatively appeared there was a stranger in the grand jury room while the government witness Evans was testifying. A. 261).

The motion was denied.

The witness was at the Haines Grocery, 2300 Lake Street, burglarizing it after he made a statement to the government and he was due to go to court for that offense on March 26, 1962 (A. 268).

On further cross examination, the witness stated he took heroin a few times after August, 1960. He smoked marijuana a couple of weeks before the trial (A. 269). He used heroin on the night prior to his testimony before the grand jury; and he used heroin on the day he made the statement and spoke to agent Valentine (A. 271).

On further cross examination, the witness admitted to using heroin, cocaine, morphine, marijuana, and codeine (A. 275). He took some cough medicine, Tussar which had codeine, the morning of his testimony (A. 275). He took a couple of big swallows from the bottle the morning of his testimony. (A. 276).

EVIDENCE PERTAINING TO THE OTHER DEFENDANTS

Government witness Noble Thigpen testified he had been a narcotic addict, but was not one now (A. 53). He used narcotics from 1949 to 1958 and started back occasionally (A. 53). Commencing in 1950 he bought about a fourth of an ounce of narcotics about once a week. He used some and sold the rest of it. He met Katy B. Lewis and started purchasing narcotics from her around 1951 (A. 56). (Objections by the defendants as being outside the indictment were overruled. A. 56). He met Katy B. through defendant Spurlark. He talked with Spurlark over the phone in 1951 and Spurlark told him to get narcotics from Katy B.'s house. (Objections as to the matters predating the indictment were overruled. A. 56). He picked up an ounce and later paid $3,000 to Spurlark. He made purchases about once a week from Katy B. Lewis until she died in 1956 (A. 56-57). When Katy died in 1956, he spoke to Spurlark, who then sent the witness to Willard Jones, who sold the witness narcotics a couple of times for $100 (A. 60).

He hired defendant, attorney Edward Gayles, to represent him in a narcotics case in 1953. Gayles represented him in court and he was discharged. Gayles said that for $125 per month he would see to it that the witness was not bothered by the arresting officers (A. 61). (Defense counsel moved for a mistrial on the ground that evidence of other crimes—that is, the alleged bribery of police officers—was prejudicial. The court denied the motion for the mistrial, but stated that he would strike the testimony of the witness and advise the jury to ignore it (Tr. 150-151). The court directed the jury to ignore and remove from its consideration any recollection of the conversation Thigpen had with Gayles respecting the pay-

ment of money on the ground that it was not relevant for the consideration of the matters in this case (Transcript of Proceedings, 154-155).

After he went to Lexington, Kentucky for a few weeks, for a cure for his addiction, he came back to Chicago and spoke with Spurlark. He stated he wanted to go back in business, but Spurlark said he could not help him. Three weeks later, Spurlark gave him a package of white powder which he tested and mixed. The price was $400 (A. 61). In June, 1958, he received another package from Gladys Davis for $500. On July 12, 1958, he sold a package to agent Bailey; and on July 17, 1958 sold more powder to agent Bailey, which he had received from Spurlark (A. 62).

On cross examination, the witness testified he used narcotics up to November, 1961 (A. 63). (The instant trial occurred February, 1962). When he was released from Lexington in March, 1958, and wanted to go back into the traffic, "In my mind this was a new venture for me." (A. 67).

Narcotic agent James Bailey testified he purchased some narcotics from Noble Thigpen through Larry Brooks in July, 1958. The envelopes purchased by Bailey, exhibits 20, 21, 33-A and B and 34-B and C were admitted into evidence over the objections of Green's counsel who explained that there was no connection between Green and the entire transaction (A. 85). The court admitted the evidence without any limitation (A. 85).

Government witness Woodrow Wilson testified he met Katy B. Lewis and Spurlark in 1952. Katy introduced him to Spurlark. He bought some white powder for $400 and made several more purchases until the latter part of 1953 when he got "hot" and left Detroit for

Milwaukee. He sold narcotics in Milwaukee which he had obtained from Spurlark (A. 91). He went into the Army in April, 1955. Before he left Chicago in 1952, he knew a man by the name of "Big John" in the latter part of 1954 (A. 91). In September or October, 1954, Spurlark asked him why he wasn't buying as much stuff as he had been, and the witness told him that a fellow on 24th Street, Big John, had a connection of his own and that the stuff was better. Spurlark asked if the witness knew Big John's connection and he said he did not (A. 91). Spurlark said he saw some people and they wanted to bust Big John. He met Spurlark in Mr Gayles' house. A Mr. Bryson and a Mr. Sims were there, also. They discussed making a buy from Big John. Spurlark gave him $500 to make a buy from Big John. When he gave Big John the money the next day, he saw Bryson and Sims trailing Big John (A. 82-93). Later Big John give him a package of the white powder which he gave to Spurlark. This was in November, 1954 (A. 93).

The largest single purchase of white powder he ever made was a quarter of a kilo from Spurlark early in 1955 for which he paid $3,300. He went into the Army in April, 1955 (A. 94).

At the time he talked with Dennis Green, his relations with Spurlark had been severed for a period of a couple of months (A. 104). When he went to Green, he had ceased operations with Mr. Spurlark and had gone around looking for somebody else and selected Dennis Green because he had a falling out with Spurlark (A. 105).

Government witness Elaine Wilson testified she was the wife of Woodrow Wilson and that after her husband went to the Army she received brown envelopes with some white powder in it from Katy B. pursuant to an arrangement

she and her husband had with Spurlark, which envelopes she gave to Dorothy Johnson for $350. She paid Katy B. the sum of $280 for it. This arrangement went on every two weeks for about five months (A. 126-128).

In June, 1957, defendant Gayles represented her husband in a case in the federal court in St. Louis (A. 128).

(The testimony of narcotic agent Robert Taylor with respect to purchases of narcotics from the defendant Willard Jones in April, 1957. (A. 152-155) was not admitted as against the defendant Dennis Green (A. 155).

Narcotics agent Charles Voll testified he talked to Willard Jones in April, 1957, after Jones was arrested (A. 163). (Green's counsel objected, but the objection was overruled. A. 164) The agent discussed with Willard Jones his source of narcotics and Jones stated that they were Italians named Al and Joe. (Green's objection to strike the evidence was overruled, and defense motions for a mistrial were overruled. A. 166.)

Narcotics agent Attie testified to his search of the apartment of Jones' girlfriend after Jones' arrest (A. 167-168). (Green's objection to the testimony was overruled. A. 167.) Attie testified to finding narcotics in Jones' girlfriend's bedroom. (A. 168).

Government witness Minnett Malpohn testified she spoke to defendant Spurlark in December, 1957, in the neighborhood of 47th Street, gave him $100 and he gave her a package of white powder which she sold. In February, 1958, she received another package of white powder from Spurlark and sold it in July, 1958 to Lemuel Kemp for $200 (A. 197-198).

Narcotic agent Joseph Dino testified he set up Minnett Maljohn to sell a package to Kemp in Davenport, Iowa (A. 200-201). (Upon defense motion to strike the testi-

mony of agent Dino, the court instructed the jury that what occurred in Davenport, Iowa was not material to the conspiracy and that the only relevance it had was to identify the exhibit 19-32A, being a form 417 which Dino executed in relation to grains of white powder which he received from Kemp and turned over to the United States chemist.)

Government agent George Abraham testified that in February, 1953, special employee Paul Spencer met with one Raymond Daniels and were seen talking to defendant Spurlark. Later, Daniels and Spurlark were alone. They joined special employee Spencer, who left and then gave a package to the witness. The same thing was repeated on March 2 and 9, 1953. Government exhibits 1-10, 2-11, 3-12 were typed forms describing the transactions. The contents of the packages themselves were destroyed (A. 210). The exhibits were admitted over the objections of the defendant. (A. 214).

Government witness Moses Winston Mardis testified he was in the bail bond business in 1954 and 1955 and arranged for the bond of Charles Webb in October, 1954 and for the bond of Cornelius Mack. In May, 1955, he bonded out the defendants Percy Johnson and Floyd Williams, at the request of defendant attorney Gayles. After he bonded them out, the witness called Gayles and said that Johnson and Williams were cooperating with the government. He also spoke to Spurlark, who told the witness to bring Johnson and Williams to Gayles' office (A. 218-219), which he did.

Government witness William Rouzer testified he met defendant Spurlark in 1955 or 1956. He bought two ounces of cocaine from Spurlark for $500, and went to Detroit. He had several more transactions with Spurlark and then did not see Spurlark any more until about July, 1958. He saw defendant Spurlark and purchased ten ounces of heroin

and two ounces of cocaine. He saw Gladys White in Detroit, Michigan about twelve to fifteen days after that, and she said that Ted had sent her, so he gave her $700 (A. 301-305).

EVIDENCE FOR DEFENDANT DENNIS GREEN

Defendant Dennis Green testified he lived in Los Angeles, California with his four children, was thirty-two years of age and had never been convicted of any felony. He denied he had conversations with Woodrow Wilson relative to the purchase or sale of narcotics and denied that he had any conversation with Wilson telling him that he should see or talk to Harriet Doyle. He denied he ever talked to Woodrow Wilson in his life concerning the sale or purchase of narcotic drugs. He met Wilson in a gambling place where they argued about money and Wilson pulled a knife on him in 1955. He had no other transaction with Wilson (A. 386-387).

He knew Willard Evans since grammar school in 1940. He graduated from grammar school in 1942 and went to Crane Tech High School, after which he went to Herzl College. At no time did he ever sell, or transfer any narcotic drugs to Willard Evans, nor did he ever have a conversation with Willard Evans regarding the sale or transfer of narcotic drugs. Willard Evans never paid him any money for narcotic drugs, nor money for any protection or for any reason (A. 387-388).

He lived in California since 1957 (A. 388-389).

He owned a barbecue business in Los Angeles for about a year and a half. Before he moved to California, he was in the real estate business as a real estate broker (A. 389).

EVIDENCE ON BEHALF OF THE OTHER DEFENDANTS.

Defendant Edward R. Gayles testified he was a practicing attorney and was admitted in 1950. Prior to that he entered the Army as a private, was released as a lieutenant. He worked in the Post Office while going to law school. Then he worked for the Veterans Administration; then obtained a job as a narcotic agent with the United States Treasury Department. He worked there for two years from December, 1950 to December, 1952. He entered the private practice of law in December, 1952, and became an investigator with the Illinois Crime Prevention Bureau. He went into the law office of Attorney Joseph Clayton where other lawyers also had offices. He knew Winston Mardis as a bail bondsman. He had represented government witness Woodrow Wilson in a case against him. He never asked Wilson who "Big John" was, nor was Woodrow Wilson ever in his home in the presence of Spurlark, James Bryson or George Sims.

He knew government witness Willard Evans as a defendant in the Criminal Court Building in 1954. Mr. Clayton was Evans' attorney. He did not have Evans hide out from the police. He never told Willard Evans he wanted money to fix any case.

He never conspired with anyone to violate the narcotic laws, nor to violate any other law (A. 315-329).

A judge, a number of lawyers, and a number of professional people testified to the good reputation of Gayles (A. 347-354).

Lieutenant George Sims of the Chicago Police testified he was with the detective division of the Bureau of Narcotics from 1951 to 1959, that he knew Edward Gayles,

and that there was no meeting in Gayles' home in the presence of Spurlark and Woodrow Wilson where the name "Big John" came up.

A number of witnesses testified to the good reputation of the defendant Nathaniel Spurlark (A. 374-375).

Dr. Jerome Katz testified he was a psychiatrist and was familiar in his practice with the subject of narcotic addicts. He was present in the court room when government witness Willard Evans testified. The doctor testified it was extremely rare to "kick the (narcotic) habit cold turkey." (A. 378-382).

Narcotic agent Wayne Valentine testified on behalf of the defendant White that the testimony of government witness Willard Evans that he was in the grand jury room with Evans was not true (A. 385).

REBUTTAL FOR THE GOVERNMENT

Dr. David Looff testified he specialized in psychiatry, was connected with the United States Public Health Hospital at Lexington, Kentucky, and that in his opinion, thirty-five days in jail was a sufficient time for an addict to "kick the habit" (A. 391).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

AS THIS WAS A CLOSELY CONTESTED CASE ON THE FACTS, IT WAS ERROR FOR THE COURT TO PERMIT THE JURY TO CONSIDER THE GOVERNMENT WITNESSES NOBLE THIGPEN AND WILLARD EVANS AS ANY OTHER COMPETENT WITNESSES. NOTWITHSTANDING THEY BOTH ADMITTED TO BEING NARCOTIC ADDICTS FOR A GOOD MANY YEARS.

IT WAS NOT ONLY ERROR FOR THE COURT TO REFUSE TO INSTRUCT IN ANY MANNER THAT THE JURY SHOULD VIEW WITH CARE AND CAUTION AND EXTREME SUSPICION THE TESTIMONY OF A NARCOTIC ADDICT, BUT THE ERROR WAS COMPOUNDED WHEN THE COURT ADVISED THE JURY THAT "A WITNESS WAS PRESUMED TO SPEAK THE TRUTH."

CONSIDERING THE PREVALENCE OF NARCOTIC PROSECUTIONS BY USE OF INFORMANT ADDICTS, THEMSELVES AMENABLE TO THE PROSECUTION ARM, CERTIORARI SHOULD BE GRANTED IN ORDER THAT THIS COURT MAY GUIDE THE TRIAL COURTS ON HOW TO INSTRUCT JURIES IN THE CONSIDERATION OF THE TESTIMONY OF ADMITTED NARCOTIC ADDICTS. ALTHOUGH A NUMBER OF CIRCUITS HAVE SPOKEN AND A FEW OF THE STATE SUPREME COURTS YOUR HONORS HAVE NOT YET REVIEWED THE ISSUE.

Government witness Willard Evans gave damaging testimony against the defendant (A. 227-247). He admitted

to being a narcotic addict for about ten years (A. 245) but stated that he kicked the habit. Expert testimony was introduced on the part of the defense that such person as Evans, considering his history of addiction, could not have kicked the habit (A. 378-383). The government presented expert testimony somewhat contrary to the defense expert (A. 391-393). Noble Thigpen also admitted to being an addict (A. 53, 63).

The jury's evaluation of the credibility of Evans was certainly crucial as to Green. The memory and/or truthfulness of Evans was seriously impaired when the narcotic agent assisting the prosecution in the case testified that Evans' memory was wrong with respect to Evans' testimony that the agent, Valentine, was in the grand jury room at the time when Evans gave testimony (A. 263-264). Motions for dismissal of the indictment were made on the ground that the secrecy of the grand jury proceedings were violated, which motions were based upon Evans' testimony that Valentine was present (A. 258, 261).

It was important then that the jury be instructed regarding the credibility of a witness who admitted to the use of narcotic drugs. Defense offered instructions on this point were refused (A. 442). It was proposed that the jury be instructed to the effect that:

> "You are instructed that in determining the credibility of a witness, you may consider his use of narcotic drugs or any impairment of testimonial powers arising from any source. The capacity of a witness to observe and receive accurate impressions, to retain them in his memory and to correctly relate them; also his power and inclination to be truthful are all subjects that go toward the credibility of a witness."

Additional offered defense instructions on this point which were refused follow:

> "Government witness Willard Evans has testified that he has been a narcotics user and addict for a period of about ten years prior to August 1961. His testimony should be received by the jury with extreme caution and suspicion. It is only when his testimony is corroborated by other credible evidence, and testimony that the jury should give serious consideration to the testimony." (A. 443).
>
> "The Court instructs the jury that the testimony of an admitted narcotic addict should be received by the jury with great caution and suspicion as such evidence is subject to imperfection, deceit and mistakes." (A. 443).

And,

> "The Court instructs the jury that where the evidence shows that a witness is a narcotic addict, that fact has an important bearing upon the credibility of such a witness. Although it does not follow that the testimony of such a witness must be disbelieved, the fact of his addiction is a fact on which the jury must take into account in weighing his testimony." (A. 444).

It was up to the jury to determine whether or not Evans was addicted to the use of drugs and to what the conflicting expert testimony of Dr. Katz (for the defense, A. 378-383) and Dr. Looff (for the prosecution, A. 391-393) determined.

In *Fletcher* v. *United States*, D.C. Cir., 158 F. 2d 321, a conviction was reversed where the government used a paid informer who was a narcotic addict to make a sale; and a sale to the informer was allegedly made by the defendant. The trial court in *Fletcher* refused an instruc-

tion similar to that offered here. The Appellate Court stated, p. 322:

> "Granting that the credibility of the testimony of a paid informer is for the jury to decide, it nevertheless follows that where the entire case depends upon his testimony, the jury should be instructed to scrutinize it closely, for the purpose of determining whether it is colored in such a way as to place guilt upon a defendant in furtherance of the witness' own interest. . . . And when to this is added *the well recognized fact that a drug addict is inherently a perjurer where his own interests are concerned, it is manifest either that some corroboration of his testimony should be required, or at least that it should be received with suspicion and acted upon with caution.* . . . The duty is more impelling where, as here, there is not a jot or tittle of other evidence and a criminal record of the witness is shown." (Emphasis added).

To similar effect see *People* v. *Crump*, 5 Ill. 2d 251, 261; *State* v. *Prentice*, 192 Ia. 207, 183 N.W. 411; and 52 ALR 2d 834.

In *State* v. *Fong Loon*, 29 Idaho 248, 158 P. 233, 236, the court stated,

> ". . . habitual users of opium, or other like narcotics, become notorious liars . . . 'the chronic morphinomaniac is often a confirmed liar. The truth is not in him.' . . . The capacity of a witness to observe and to receive accurate impressions, to retain them in his memory, and to correctly relate them, also his power and inclination to be truthful, are all subjects which go to the credibility of a witness."

There is little protection for an individual accused by an informer who has his own purposes and his own interests at stake. It is most difficult to defend an accusa

tion of sale of narcotics where there is not official surveillance or some corroboration. Accordingly, the reviewing courts view with great suspicion convictions based on uncorroborated testimony of government informers with respect to accusations of narcotic violations.

The Supreme Court of Illinois recently reversed a conviction by a judge on a bench trial based on informer's testimony where there was no substantiation of the informer, either by way of police surveillance or narcotics being found on the defendant or marked money being found on his person. *People* v. *Bazemore*, 25 Ill. 2d 74, 182 N.E. 2d 649 (1962). The court said:

> "Where, as here, the state's case rests solely upon the credibility of an admitted narcotics addict, a trial court, and in the final analysis this court, must carefully and closely scrutinize the testimony of the witness . . . although it does not necessarily follow that his testimony must be disbelieved. . . . *The fact that a witness is a narcotics addict has an important bearing on his credibility.*
>
> "This is not a case where the informer's accusation receives corroboration from close police surveillance of the transaction, from an immediate arrest, or from the finding of marked money on the accused, *but one which developed in such a way that the informer was at liberty to name almost any person he wished to select as the guilty one.*" (Emphasis added).

If a trial court hearing the case without a jury must take into consideration that a prosecution witness' *addiction to narcotics* bears upon his credibility, how much more important it is that a jury be instructed as to the manner of evaluation of such person's testimony.

In addition to refusing to give proper instructions on this point, the court erroneously instructed the jury on how to evaluate the credibility of a witness.

This was a close case, in which the allegations on the part of the government witnesses were denied by the defendants, and in particular by defendant Green. The issue of the credibility of Evans and Wilson on the one hand, and that of Green on the other, was entirely for the jury to decide under a set of proper instructions. The court erroneously instructed the jury as follows:

> "A witness is presumed to speak the truth, but this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence."
>
> • • •
>
> "If you find the presumption of truthfulness to be outweighed as to any witness, then you will give the testimony of that witness such credibility, if any, and such weight, if any, as you think it deserves." (A. 420).

The vice of that erroneous instruction was discussed in the recent case of *Knapp* v. *United States*, 5 Cir. 316 F. 2d 794 (1963). Circuit Judge John R. Brown, with respect to the court's discussion of the exact charge here given, stated:

> "These charges are not only deficient from a structural standpoint, I think they are positively wrong." (p. 795)

And further (p. 796):

> "Considering the charge as a whole, which the law exacts of appellate courts and theoretically of juries, it lays down the proposition that as a matter of law, and not as a mere matter of inferences or impressions drawn, a witness speaks the truth unless there is 'convincing evidence', to the contrary. . . ."

"Recasting the instructions on the credibility of a witness, the shorthand symbol 'presumed' or 'presumption' would make them read substantially as follows:

> 'The law requires that the jury conclude that a witness speaks the truth. . . .'

"This is more than mere confusion engendered by the loose, inarticulate use of the ambiguous word 'presumption' or 'presumed' which this Court pointed out in *Barfield* v. *United States*, 5 Cir., 1956, 229 F. 2d 936 at 939-941. Here 'presumption' becomes a mandate of law.

"Of course once it becomes a mandate, it is positively wrong. This is so because the truth finding function of a jury in determining the credibility of a particular witness is not a matter which can be committed to a verbalized formula by a Judge or a number of Judges or a Court or a number of Courts. Nor is the matter saved by such weasel-phrases such as 'in the absence of convincing evidence to the contrary,' 'until outweighed by evidence to the contrary,' etc.

"What is truth relates to facts, not legal principles. *Who* is telling the truth is not a legal question. *How* the truth is determined is not a legal matter. This is a thing committed to the common sense and good judgment of the jurors based on everyday experiences as human beings in an imperfect society. A moment's reflection will remind even Judges that in the quest for truth in their affairs off the bench they believe, they disbelieve, they accept, or they reject the statements of their fellow men in countless situations most frequently by intuitive judgment or impression wholly incapable of an articulate elucidation. The genius of the jury system is to transport this common sense into the machinery of the law. If the law undertakes to prescribe categorically either *what* is truth, or *who* is truthful, or *how* one goes

about ascertaining *who* or *what* is truthful, the verdict becomes something less than the reflection of this process of good common sense. (Emphasis, the court's.)

The 7th Circuit here held that *Fletcher* v. *United States*, 158 F.2d 321, D.C. Cir. and *People* v. *Bazemore*, 25 Ill. 2d 74, did not apply (Opinion, Appendix "A", p. 8). But, the government's case against petitioner largely depended upon the government witness Willard Evans who admitted to being a narcotic addict for ten years (A. 245). Government witness Thigpen also admitted to being a narcotic addict (A. 53, 63). Petitioner Green testified fully and subjected himself to cross examination. He was a person never before arrested, married, with a family, and who had legitimate businesses (A. 386-389).

It was most incumbent, then, for the jury to receive careful instructions with respect to the evaluation of the testimony of government witnesses Evans and Thigpen, as against the testimony of defendant Green. It is to be remembered that this was not an overwhelming case against Green, but rather a close one in which there was no corroboration by any "legitimate" government witness of the story of the witness Evans. Under the circumstances then, it was reversible error not to instruct as requested (A. 442; 443 and 444).

This Court, stated, *On Lee* v. *United States*, 343 U.S. 747, 757, that:

> "The use of informers, accessories, accomplices, false friends, or any of the other betrayals which are 'dirty business' may raise serious questions of credibility. To the extent that they do, a defendant is entitled to broad latitude to probe credibility by cross-examination *and to have the issues submitted to the jury with careful instructions.*" (Emphasis added.)

Just as it is essential to a fair trial that the court allow cross examination as widely as the rules of evidence permit where the principal witnesses for the government have criminal records or have engaged in illegal practices, *United States* v. *Masino*, 2 Cir. 275 F.2d 129, it is essential to a fair trial that proper instructions be given to the jury on these types of witnesses.

The trial court failed to give *any* of the requested instructions with respect to the evaluation by the jury of the testimony of a witness who was an admitted narcotic user. The Appeals Court holding that the court's instruction to the jury to give careful scrutiny to the testimony of each witness and to observe his demeanor on the witness stand was proper fails far short of the requested instructions under the circumstances. It has decided this federal question in a manner in conflict with the District of Columbia Circuit (cf. *Fletcher* v. *United States*, 158 F.2d 321).

We submit your Honors should grant certiorari to advise the various circuits and the district judges whether Judge Brown's criticism of an instruction that, "A witness is presumed to speak the truth" is valid criticism.

It is apparent that trial judges are advising juries that "A witness is presumed to speak the truth" because such instruction is included in a list of suggested jury instructions compiled by Judge Mathes of the Southern District of California. See 27 FRD 67.

The Seventh Circuit agrees that such instruction is proper. The Fifth Circuit disagrees and criticizes the instruction. *Knapp* v. *United States*, 316 F.2d 794 (1963). Your Honors should decide, amongst other matters, which Circuit is correct.

II.

WAS IT NOT FURTHER ERROR TO REFUSE TO INSTRUCT THAT THE TESTIMONY OF GOVERNMENT WITNESSES WHO ADMITTED THEIR PARTICIPATION IN CRIME SHOULD BE RECEIVED WITH SUSPICION AND ACTED UPON WITH CARE AND CAUTION?

This Court has announced that the theory of trials in this country depends upon the jury's evaluating the evidence in accordance with appropriate guiding instructions by the court. *Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242.

Considering the direct disputation of the evidence between the government witnesses Evans and Wilson and the petitioner, it was incumbent upon the court to instruct the jury that the testimony of witnesses Evans and Wilson should have been scrutinized with care and caution and received with suspicion.

The petitioner avoided offering an "accomplice" instruction for the reason that an accomplice is one who unites with another in the commission of a crime. *Caminetti* v. *United States*, 242 U.S. 470. For it was the theory of the defense that no crime at all was committed between the witnesses and the petitioner. Accordingly, petitioner offered his instruction as follows (A. 442):

> "You should scrutinize very carefully the testimony of any witness who has turned 'government witness'

> insofar as to incriminate himself, or with others in the offense charged. That evidence is not to be taken as that of an ordinary witness of good character. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses."

The court refused to give this instruction; and gave no other instruction affective of the consideration which the jury should give these kind of "government witnesses". The court did give an instruction as follows (A. 420-421):

> "In this connection if you find from the evidence that any witness for the prosecution has been promised immunity or has received immunity from the prosecution, or reward for any testimony given by him in this case, or anticipated or hoped for, or expected immunity or some other reward, or advantage as a result of, or dependent upon his testimony, then you are entitled to consider that fact or those facts in weighing his credibility as truthfulness as a witness."

But such instruction falls far short, and is different from, the instruction which petitioner requested and which was pertinent to the situation in the case.

This question was raisgd on review, but the Court of Appeals failed to render its opinion in this matter. It merely stated that it saw no need of discussing the claimed error on this instruction (Opinion, Appendix A pp. 8-9).

It may be that the Court of Appeals would not have been able to meet its own opinion in *United States* v. *Balodimas*, 7 Cir. 177 F.2d 485, 487 wherein the court agreed that to call a government witness "an accomplice" would be to affect the minds of the jury in deciding the issue before it. "If the jury accepted the court's theory

that these witnesses were accomplices and had openly admitted that they were law violators and that they had a part in the commission of the crime, it is difficult to discern how they could have avoided the conclusion that error on this instruction (Opinion, Appendix A, p. App. 1). the defendant was also guilty." (p. 487).

It was for that precise reason the petitioner offered the instruction he did (A. 442).

This Court has not spoken in connection with the manner by which the trial courts should instruct regarding the testimony of witnesses who incriminate themselves with others, but whom defendants object to being called accomplices.

III.

EVEN IN A CONSPIRACY CASE THE GUILT OF A DEFENDANT IS INDIVIDUAL. IT WAS ERROR FOR THE COURT TO INSTRUCT THE JURY THAT IT MAY FIND THE PETITIONER GUILTY EVEN IF HE DID NOT HAVE KNOWLEDGE OF THE DETAILS OR MEANS BY WHICH THE OBJECT OF THE CONSPIRACY WAS TO BE ACCOMPLISHED.

The permissive presumption feature of Section 174, Title 21, U. S. Code was improperly abetted by the court's equivocal and erroneous instruction on this essential element of the crime.

Instructions of the court must not be equivocal. *Bollenbach* v. *United States*, 326 U.S. 607, 613; and the issues must be submitted to the jury with careful instructions. *On Lee* v. *United States*, 343 U.S. 747, 757.

The statute under which defendant was found guilty is Section 174, Title 21, U. S. Code. In pertinent part it is as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or

any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned. ... .

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The object of the conspiracy, then, is the unlawful importation into this country of the narcotics, knowing the same to have been imported illegally.

Possession of the narcotics, or aiding or abetting in the possession thereof, by itself, is no federal offense. *United States* v. *Landry*, 7 Cir., 257 F.2d 425, 431. In a conspiracy to possess, the knowledge that the heroin was imported illegally into the United States is the essential element. The jury may infer from the fact of possession that a defendant knew of the illegality of its importation. The presumption allowed by the statute is simply an evidentiary aid to the government, and does not conclusively foreclose the question. It is required of the government to prove all essential elements of the offense, *including* the knowledge that the narcotics was imported illegally into the country. Yet, the court erroneously suggested, in its general discussion of the law of conspiracy, that knowledge of importation was not necessary. The court advised the jury that the defendants:

> "... do not need to know all the details nor all of the means by which the objectives of the conspiracy are to be accomplished." (*X*. 428)

This is the very instruction in a similar charge of conspiracy to violate Section 174, Title 21, upon which the Second Circuit based its reversal of the convictions in *United States* v. *Massiah*, 307 F.2d 62, 70 (1962). There, the Court stated that the trial judge incorrectly suggested to the jury that knowledge of importation was not necessary when the jury was instructed that:

> "One may become a member of a conspiracy *without full knowledge of all the details of the conspiracy or of all the conspirators.*" (Emphasis, the Court's.)

The Court held it to be "plain error" under Rule 52(b) requiring reversal even if the point was not raised below, because, as the Court said:

> "In a criminal case, the defendant is entitled to have the jury instructed on all the elements that must be proved to establish the crime charged." (p. 71).

The error in the court's charge here is that it rejected the idea that the jury must find that the drugs were imported to the knowledge of each defendant in violation of the law. The government relied upon, and the court adopted, the presumption theory in Section 174 of Title 21. There was no proof in the entire record that Green actually knew that any heroin, or any narcotic, was imported illegally into the United States, as was required of the government to prove before conviction could be had.

In *Massiah* the court reversed, "although there concededly was sufficient evidence in this case from which the jury could find or presume knowledge of illegal importation, this provides no ground for assuming that it would have done so had the issue been presented to it." (p. 71).

The only comment the 7th Circuit Court of Appeals made was to state that the instruction of the trial court

was not error. (Opinion, Appendix A, pp. 8-9). The court did not discuss the claimed error, nor render its opinion in any manner.

The holding in *United States* v. *Massiah*, *supra*, is in conflict with the instant holding of the Seventh Circuit that the instruction was proper.

Certiorari should be granted to resolve this issue, arising as it does so often, considering the frequency of narcotic conspiracy prosecutions in the federal courts.

IV.

IT SHOULD BE DETERMINED WHETHER THE RULE IN KOTTEAKOS V. UNITED STATES, 328 U.S. 750, APPLIES IN NARCOTIC CONSPIRACY CASES.

IF THE RULE APPLIES, THE CONVICTION SHOULD BE REVERSED FOR THE REASON THAT, GRANTING EVERYTHING THE GOVERNMENT SAYS TO BE TRUE, THERE WERE SEPARATE AND DISTINCT CONSPIRACIES AMONG THE MISJOINED DEFENDANTS.

The evidence was set out at length under the statement of facts in order to demonstrate that if the government proved anything at all, it proved the several defendants were engaged in separate conspiracies, and not one joint conspiracy.

In order to demonstrate that the government's case, taken at face value, involved separate conspiracies we must demonstrate sequence by sequence, and fact by fact, that the evidentiary situation developed separate conspiracies, and not a joint one.

(Compare the detailed exposition of the evidence as requisite for a proper consideration of the case in *United States* v. *Bentvena; et al.*, 319 F.2d 916, 2 Cir. 1963).

Government witness Nobel Thigpen did not mention any defendant except Theodore Spurlark and Willard Jones (A. 53-62). He bought narcotics from Katy B. Lewis from 1951 to 1956, because defendant Spurlark told him to go to Katy's house in 1951. When Katy died in 1956, Spurlark sent him to defendant Willard Jones, who sold the witness narcotics a couple of times, according to the testimony. He went to Lexington, Kentucky for a cure and then returned and spoke to Spurlark from whom he bought white powder a couple of times. He further testified that in July, 1958, he sold some stuff to narcotic agent James Bailey which he had obtained from Spurlark.

He also hired defendant Gayle, who was an attorney, in April, 1953, for a narcotics case (A. 61).

No mention by Thigpen of Green, Faulkner or Davis.

When agent James Bailey testified that he bought narcotics from government witness Thigpen through one Larry Brooks in July, 1958, defendant Green objected on the ground that no connection was shown with Green (A. 85). The objection was overruled.

Government witness Woodrow Wilson testified he had transactions with defendant Spurlark from 1952 until he went into the Army in April, 1955. No mention of Green, Faulkner, Davis or Jones during this period of his testimony (A. 89-94). When he left the Army in October, 1955, he met Green a couple of months after that. He told Green that Spurlark was sore at him because he had made "buys" in New York (A. 95). According to the witness, Green told him to go to Harriet Doyle as ". . . my stuff would look better than Ted's (Spurlark) because he cuts his a little more than I do." (A. 95). He then saw Harriet Doyle and had two transactions with her for $400 an ounce (A. 95-96).

Later, he purchased from Spurlark again, and when Katy B. died, he purchased from Willard Jones, whom he met through Spurlark, until June, 1957 (A. 96).

Not only was there no showing that Green and Spurlark were in a conspiracy to sell narcotics to Wilson, but the contrary was shown. Wilson testified that he selected Green because he had a falling out with Spurlark, that he had ceased operations with Spurlark, and had gone around looking for somebody else (A. 105). He had discontinued having anything further to do with Spurlark for two or three months and that is the time that he went and talked to Dennis Green. "My relations with Spurlark had been severed for a period of a couple of months at this time." (A. 104).

Elaine Wilson, the wife of Woodrow Wilson testified she bought narcotics from Katy B. after an arrangement with Spurlark after Wilson left for the Army (A. 126-129). There was no connection shown between this testimony and any of the other defendants.

Narcotics agent Robert Taylor testified he bought some narcotics from defendant Willard Jones in April, 1957 (A. 152-156). No other defendant was mentioned by Taylor; and as a matter of fact, conversations between agents Taylor and Voll, and defendant Jones, were not admitted as against the defendant Green (A. 155). However, the court allowed the "acts" between the parties to be considered by the jury (A. 163).

So far removed was some of the evidence introduced by the government from anything charged in the indictment, that testimony by narcotic agent James Attie, that after Willard Jones was arrested he searched Jones' girl friend's apartment and found narcotics was admitted into evidence over objections (A. 167-176).

A totally irrelevant transaction (as to Green) between government witness Minnett Maljohn and Spurlark in July, 1958 was introduced (A. 197-199) for the purpose of getting into evidence testimony that Maljohn sold a quantity of powder to one Lemuel Kemp in Davenport, Iowa (A. 200-205). *This was in July, 1958 after Dennis Green had left to reside in California in 1957* (A. 389).

Narcotic agent George Abraham testified that in February and March, 1953, a special employee, Paul Spencer and a Raymond Daniels bought narcotics on three occasions from Spurlark (A. 206-213).

Government witness Willard Evans testified that he bought narcotics from defendant Green from 1952 to 1954. Then he stopped buying for a while from Green and started again after that (A. 227 to 239). In May, 1954, Moses Mardis introduced Evans to Spurlark and Spurlark told the witness that his stuff was better than the stuff the witness was getting from Green (A. 230). So he started to buy from Spurlark through Katy B. Lewis. In November and December, 1955, the witness testified he became partners with defendant Faulkner and that he and Faulkner bought some narcotics from Green for $6,000. In April, 1956, he again bought some white powder from Green after he had a split with Faulkner (A. 235).

Evans also testified that some time early in 1955, in Moses Mardis' house, Green, Mardis, Spurlark and one Jimmy White were present and then were talking about Dennis taking over the sale of narcotics on the west side (A. 232). (It is interesting to note here that when the government presented Moses Mardis as a witness (A. 217-220), he gave no such testimony of a meeting in his house as testified to by Willard Evans.)

From all that appears in the testimony, believing the government witnesses, Spurlark and Green were competitors. Spurlark never had any transactions or dealings with defendant Faulkner, according to the evidence.

Defendant Gayles is never shown to have engaged in any narcotics transaction. The worst interpretation that can be placed upon defendant Gayles' activities, according to the testimony of the government witnesses, is that he, as an attorney, represented some of the government witnesses in court. He represented government witness Woodrow Wilson in St. Louis in 1957, when Wilson entered a plea of guilty and received a sentence of five years (A. 128). He represented the government witness Noble Thigpen in April, 1953, in which case Thigpen was discharged (A. 61). Gayles also represented Willard Evans in 1957 on some State charge (A. 245), according to Evans; but this was denied by Gayles.

Whatever was proved against Gayles, certainly there was no *conspiracy* between Gayles and Green, or any other defendant, *to import narcotic drugs or to facilitate its transportation.*

The facts here are similar to those in *Kotteakos v. United States*, 328 U.S. 750, where this Court held the government proved not one conspiracy, but eight or more different ones of the same sort (p. 752). Your Honors stated, (p. 755):

> "The proof therefore admittedly made out a case, not of a single conspiracy, but of several, notwithstanding only one was charged in the indictment. (citing cases). The Court of Appeals aptly drew analogy in the comment, 'thieves who dispose of their loot to a single receiver—a single "fence"—do not by that fact alone become confederates. They may, but it takes more than knowledge that he is a "fence" to make them such.' 151 F. 2d at 173."

And further, p. 764:

> "In criminal cases the outcome is conviction. This is different, or may be, from guilt in fact. It is guilt in law, established by the judgment of laymen and the question is, not were they right in their judgment regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting."

The facts in this case are remarkably similar to the facts in *United States* v. *Russano*, 2 Cir., 257 F. 2d 712, where the court reversed a conviction for conspiracy to traffic in narcotics where the evidence established two separate conspiracies. There, the same appellants engaged in certain dealings in narcotics in 1952, and then, after a lapse engaged again in dealings in narcotics in 1955 and 1956. The government charged a continuing conspiracy from 1951 to 1957. Even though the court assumed that the properly admitted evidence at the trial would suffice to establish an offense of conspiracy in 1952 and the separate offense of conspiracy in the years 1955-1956, the court reversed for the reason that evidence regarding the appellants' activities in the latter years should not have been introduced as affecting the consideration of their activities in 1952; and accordingly, the court reversed and remanded.

The reverse of the situation occurred in *United States* v. *Aviles*, 2 Cir., 274 F. 2d 179, where three of fourteen defendants in a narcotics conspiracy trial held under Section 174, Title 21, U. S. C., complained that they could not be convicted because of double jeopardy, in that they had already been convicted for the same acts. (See *United States* v. *Stromberg*, 2 Cir., 268 F.2d 206.) In *Aviles*, the Court held (p. 194) the fact that some defendants in a

prosecution for conspiracy to violate narcotic laws had as dealers been convicted for purchasing narcotics from a particular party and after that party's arrest, then turned to other defendants for their supply, did not transform the two separate conspiracies into one, and they were not entitled to an acquittal on the ground that they were twice placed in jeopardy.

If, then, to convict, the court held that separate transactions such as those testified to in the instant case were separate conspiracies for which separate indictments and separate convictions and punishments thereon were proper, should not the 7th Circuit similarly have held that separate conspiracies are involved, and accordingly reverse? See *United States* v. *Bentvena, et al.*, 2 Cir., 319 F. 2d 916 at 945 (1963).

CONCLUSION

The conspiratorial device theory as now presented by the federal prosecutors give ample proof to the warning of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, p. 445-6, "The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice."

He concluded, p. 458, "The most odious of all oppressions are those which mask as justice."

We pray your Honors will consider this a fit case to grant its writ of certiorari.

Respectfully submitted,

GEORGE F. CALLAGHAN
JULIUS LUCIUS ECHELES
Attorneys for Petitioner